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June 20, 1994

William Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20054

Re: In the Matter of Revision of
Part 22 of the Commission's
Rules Governing the Public
Mobile Services
Comments in Response to Further
Notice of Proposed Rulemaking
CC Docket No. 92-115

Dear Mr. Caton:

Transmitted herewith on behalf of Tri-State Radio Co. is an original and four (4) copies of its "Comments" with regard to the above-referenced proceeding.

Should any questions arise with respect to this matter, please communicate directly with this office.

Respectfully submitted,

Richard Becker

Richard S. Becker
Attorney for Tri-State Radio Co.

Enclosures

No. of Copies rec'd 0+4
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 of the	)	CC Docket No. 92-115
Commission's Rules Governing	)	
the Public Mobile Services	)	

To: The Commission

COMMENTS

Respectfully submitted,

TRI-STATE RADIO CO.

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Its Attorneys

Date: June 20, 1994

TABLE OF CONTENTS

SUMMARY

Tri-State Radio Co. ("Tri-State") hereby comments on one aspect of the proposal set forth in the Further Notice Of Proposed Rulemaking ("FNPRM") in the above-captioned rulemaking proceeding. Tri-State's Comments relate only to that portion of the FNPRM proposing revised processing procedures for applications for 931 MHz one-way paging systems in the Public Land Mobile Service ("PLMS") governed by Part 22 of the Commission's Rules. More specifically, Tri-State firmly opposes the Commission's attempt to apply those standards to situations where the underlying 931 MHz applications have already been acted upon by the Commission, but where such action is the subject of a pending petition for reconsideration or application for review.

Tri-State is a communications company primarily engaged in the provision of one-way paging services pursuant to Public Land Mobile Service ("PLMS") authorizations granted under Part 22 of the Commission's Rules and pursuant to authorizations granted under Part 90 of the Commission's Rules. As a multi-state, wide-area 900 MHz paging operator, Tri-State is extremely interested in the proposals set forth in the FNPRM as they relate to Part 22 931 MHz application processing procedures.

The Commission's proposal to reclassify as pending those applications that have already been acted upon by the Commission must first be rejected because the Commission lacks legal authority to retroactively apply its proposed 931 MHz processing rules without addressing pending reconsideration requests. Pursuant to Section 405(a) of the Communications Act of 1934, as amended, the Commission is obligated to review and act on such appeals based on the facts surrounding the Commission action in question and an application of the Commission Rules and requirements in effect at that time. The Commission's proposal would result in action on the underlying appeals by arbitrary rulemaking fiat, rather than by a reasoned examination of the facts surrounding each petition for reconsideration and application for review and application of Commission's Rules and requirements then in effect.

Moreover, although the decisions in Storer and Hispanic cited by the Commission in the FNPRM may allow the Commission to impose new processing rules on 931 PLMS applications currently pending before the Commission, these decisions do not confer the authority to act on pending petitions for reconsideration or applications for review by post hoc rule modifications. Similarly, the Commission's proposed action cannot be supported by the fact that grant of an application can be overturned pursuant to a timely filed petition for reconsideration or application for review. Commission action on any such appeal must be justified by the Commission based on the underlying facts and the Commission Rules and requirements in effect at that time.

Equally as important, the Commission's proposal must be rejected as an impermissible attempt to retroactively apply Commission regulations contrary to judicial decisions in Chenery, Retail and Maxcell. A balancing of the judicially-enumerated factors in reviewing retroactive rules demonstrates that the Commission's proposal in the FNPRM to apply new 931 MHz PLMS application processing standards to applications that have already been acted upon by the Commission is not justified.

The Commission's proposal will also result in confusion, a substantial increase in the Commission's application processing burden and a corresponding further delay in licensing of 931 MHz PLMS systems and service to the public. Moreover, the proposal will inundate the Commission with extensive litigation in the form of additional petitions to deny, petitions for reconsideration, applications for review and judicial appeals, far greater than the litigation currently facing the Commission with respect to petitions for reconsideration and applications for review regarding applications that have already been acted by the Commission.

Finally, the Commission's proposal disserves the public interest in rapid deployment of service and efficient use of radio spectrum. Reclassification of granted 931 MHz PLMS applications as pending will result in immediate loss of the authorization for existing systems. Paging subscribers will be deprived of vital paging service that they currently use for many purposes, including emergency and life-threatening circumstances. Moreover, if licensees are unable to reacquire authorization for their systems, the extensive capital expenditure that those licensees have already made will be lost. Instead, the new licensees will be forced to incur duplicate capital expenditures in establishing their own systems. Even if the new licensees are capable of establishing new systems that would equal the existing systems, a substantial amount of time would elapse before such new systems could be implemented for service to the public.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

To: The Commission

COMMENTS

Tri-State Radio Co. ("Tri-State"), by its attorneys and pursuant to 47 C.F.R. §1.415, hereby submits these Comments in response to the Further Notice Of Proposed Rulemaking[1] issued by the Commission in the above-captioned rulemaking proceeding. Tri-State's Comments relate only to that portion of the FNPRM proposing revised processing procedures for applications for 931 MHz one-way paging systems in the Public Land Mobile Service ("PLMS") governed by Part 22 of the Commission's Rules. More specifically, even though Tri-State takes no position on the merit of the Commission's proposed 931 MHz application processing procedures, Tri-State firmly opposes the Commission's attempt to apply those standards to situations where the underlying 931 MHz applications have already been acted upon by the Commission, but where such action is the subject of a pending petition for reconsideration or application for review. In support of these Comments, the following is respectfully shown.

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[1]Further Notice Of Proposed Rulemaking, CC Docket No. 92-115, FCC 94-102 (May 20, 1994) (hereinafter "FNPRM").

I. Introduction

1. In the FNPRM, the Commission proposed revised rules governing both the Domestic Public Cellular Radio Telecommunications Service[2] and 931 MHz applications in the PLMS.[3] With respect to 931 MHz PLMS applications, the Commission found that its existing rules governing processing of these applications "no longer permit efficient processing of applications resulting in some confusion and delay"[4] and "may not provide sufficient guidance to inform applicants when 931 MHz spectrum that becomes available will be available for assignment to already pending applications."[5] The Commission proposed new processing rules that "will eliminate the backlog in pending 931 MHz applications and ensure that future channel assignments will be made in a fair and consistent manner."[6] These new application processing procedures include: (1) a requirement that 931 MHz PLMS applicants specify the frequency for which they request authorization;[7] (2) applicants may only apply for frequencies deemed available under Part 22 of the Commission's Rules, as proposed to be modified in the original Notice Of

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[2]FNPRM at ¶¶5-11.

[3]Id. at ¶¶12-19.

[4]Id. at ¶12.

[5]Id. at ¶15.

[6]Id. at ¶17.

[7]FNPRM at ¶16. Current rules require that applicants for 931 MHz PLMS frequencies receive frequency assignments chosen by the Commission staff. First Report and Order, Gen. Docket No. 80-183, 89 FCC2d 1337, 1356 (1982) (hereinafter "First R&O"), recon., 92 FCC2d 631 (1982).

Proposed Rulemaking[8] in the above-captioned CC Docket No. 92-115 rulemaking proceeding;[9] and (3) new procedures governing mutually-exclusive ("MX") 931 MHz PLMS applications, including use of competitive bidding to resolve MX conflicts.[10] In these Comments, Tri-State takes no position on the Commission's new 931 MHz PLMS application processing procedures as they apply to future applications.

2. In the FNPRM, the Commission proposed to apply its new processing rules to applications that are currently pending before the Commission.[11] The Commission would require pending applicants to amend their applications within sixty (60) days of the effective date of new 931 MHz PLMS application processing rules to specify the frequency for which they seek authorization.[12] Amended applications would be placed on Public Notice and be subject to a thirty (30) day protest period.[13] Moreover, all pending amended applications and any newly-filed applications that are MX and received within sixty (60) days of the effective date of rules adopted pursuant to the FNPRM would be considered as a processing

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[8]Notice Of Proposed Rulemaking, CC Docket No. 92-115, 7 FCC Rcd 3658 (1992) (hereinafter "NPRM").

[9]FNPRM at ¶16.

[10]Id. at ¶16.

[11]Id. at ¶¶15, 17.

[12]Id. at ¶17.

[13]Id.

group on a one-time only basis.[14] Pursuant to recent regulations adopted by the Commission pursuant to amendments to the Communications Act of 1934 (the "Act") enacted by the Omnibus Budget Reconciliation Act of 1993,[15] the Commission proposed to utilize competitive bidding to resolve MX conflicts.[16] Once again, in these Comments, Tri-State takes no position on the Commission's decision to apply its proposed processing rules to 931 MHz PLMS applications that were pending and upon which no Commission action had been taken as of May 20, 1994, the date on which the FNPRM was released.

3. Tri-State does, however, take serious issue with the Commission's proposal in the FNPRM to, "include in the category of pending applications to which the new rules would apply applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review."[17] As set forth herein, Tri-State respectfully submits that the Commission lacks legal authority to reclassify as pending those applications that have already been acted upon by the Commission based solely on the Commission's finding in the FNPRM that its proposed new rules will result in more efficient processing of 931 PLMS applications. Moreover, retroactive

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[14]Id.

[15]See Second Report and Order, PP Docket No. 93-253, FCC 94-261 (April 20, 1994) (hereinafter "Second Auction R&O").

[16]FNPRM at ¶12.

[17]Id. at ¶15.

imposition of the proposed new processing rules to such applications violates established judicial precedent. In addition, the Commission's proposal to reclassify as pending those applications that have already been acted upon by the Commission is contrary to the public interest and will only result in greater delays in 931 MHz PLMS application processing and an extraordinary increase in the litigation surrounding these applications.

II. The Interest Of Tri-State

4. Tri-State is a communications company primarily engaged in the provision of one-way paging services. Tri-State and its affiliates provide wide-area, one-way paging service in numerous states, including New York, Connecticut, New Jersey, Pennsylvania, Massachusetts, Arizona, Nevada and California. Tri-State provides one-way paging service pursuant to PLMS authorizations granted under Part 22 of the Commission's Rules and pursuant to authorizations granted under Part 90 of the Commission's Rules. As a multi-state, wide-area 900 MHz paging operator, Tri-State is extremely interested in the proposals set forth in the FNPRM as they relate to Part 22 931 MHz application processing procedures.

5. One of Tri-State's wide-area paging systems is licensed and operating on the frequency 931.4875 MHz at numerous locations along the East Coast of the United States.[18] Specifically, pursuant to the Commission's August 23, 1989, lottery among 931 MHz

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[18]Tri-State's 931.4875 MHz one-way paging system will be referred to hereinafter as the "Tri-State 931.4875 MHz System." The Commission authorizations for the Tri-State 931.4875 MHz System may be referred to collectively hereinafter as the "Tri-State 931.4875 MHz System Authorization."

PLMS applicants in the New York City Metropolitan Area in Lottery No. PMS-31, Tri-State was originally granted the frequency 931.6625 MHz at New York.[19] This lottery, however, has been the subject of extensive litigation before the Commission. By Order on Reconsideration, 5 FCC Rcd 7430 (Com.Car.Bur. 1990) (hereinafter "Recon. Order"), the Commission addressed petitions for reconsideration of the lottery results in Lottery No. PMS-31 and the application grants that resulted therefrom. With respect to the Tri-State Application, the Commission affirmed grant of 931.6625 MHz to Tri-State at New York.[20] The Recon. Order was, however, challenged by several parties and on June 24, 1992, the Chief of the Commission's Mobile Services Division, by Commission letter 63500-DHS,[21] adopted a modified frequency assignment plan to settle these appeals.[22] Pursuant to the Commission's revised frequency assignment plan, Tri-State's original authorization on the frequency 931.6625 MHz was modified to 931.4875 MHz.[23]

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[19]See File No. 28265-CD-P/L-01-88 for Tri-State Station KNKL 830. [This application will be referred to hereinafter as the "Tri-State Application."] See also Public Notice, Mimeo 4174 (August 24, 1989) (announcing the results of Lottery No. PMS-31); Public Notice, Report No. PMS-89-51-A (September 20, 1989) (announcing grant of the Tri-State application and other applications selected in Lottery No. PMS-31).

[20]5 FCC Rcd at 7432.

[21]This letter will be referred to hereinafter as the "June 24 MSD Letter."

[22]June 24 MSD Letter, p.2-3. The comprehensive settlement adopted by the Commission in the June 24 MSD Letter will be referred to hereinafter as the "900 MHz Settlement."

[23]Id. at 3.

6. Unfortunately, the litigation surrounding the results of Lottery No. PMS-31 continued when petitions for reconsideration of the June 24 MSD Letter were filed with the Commission.[24] Pursuant to well-established precedent, however, because no stay of the original grant of the Tri-State Application was sought or granted, that grant became effective on August 23, 1989, and Tri-State was required to build the facilities that would later form the basis of the Tri-State 931.4875 MHz System within the construction period

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[24]Specifically, Paging Partners, L.P. ("Paging Partners") and Citinet, Inc. ("Citinet") each sought reconsideration of the June 24 MSD Letter. On October 28, 1992, Citinet withdrew its petition for reconsideration, but the Paging Partners petition for reconsideration remains pending before the Commission. It should be noted that although the Paging Partners petition for reconsideration captioned Lottery No. PMS-31, the pleading was directed at grant of the applications of Contact Communications, Inc. for 931.9625 MHz (File Nos. 28245- and 28247-CD-P/L-01-88), that were included as part of the 900 MHz Settlement. Accordingly, it is not clear whether grant of the Tri-State Application is currently subject to Paging Partners' reconsideration request. If the Commission were to adopt the FNPRM as currently proposed, Tri-State would have to determine if the Tri-State Application is subject to reconsideration and if Tri-State would therefore be required to amend the Tri-State Application and subject the Tri-State 931.4875 MHz System to the uncertainties associated therewith as described herein. For purposes of the instant Comments, however, Tri-State is using the circumstances surrounding the Tri-State Application and the Tri-State 931.4875 MHz System Authorization to illustrate the problems that will result if the Commission adopts its proposal to reclassify as pending 931 MHz PLMS applications that have already been acted upon by the Commission. The Tri-State example assumes that the Paging Partners' petition for reconsideration involves all applications involved Lottery No. PMS-31 and specified in the June 24 MSD Letter whether or not specifically captioned and challenged by Paging Partners. Tri-State specifically reserves the right to take a position contrary to this illustrative assumption in the event that the Commission adopts processing rules as proposed in the FNPRM.

specified by the Commission.[25] The pendency of petitions for reconsideration of the Recon. Order and later the June 24 MSD Letter did not absolve Tri-State of this obligation.[26] In point of fact, Tri-State did timely construct the authorized facilities and Tri-State has now expanded the Tri-State 931.4875 MHz System to include more than ninety (90) authorized and proposed transmitter locations in the States of New York, Connecticut, New Jersey, Pennsylvania, Massachusetts, New Hampshire and Rhode Island.[27]

7. As demonstrated more fully below, these facts regarding the Tri-State Application and the Tri-State 931.4875 MHz System provide an excellent example of the injustice and harm to the public interest that will result if the Commission persists in the attempt specified in the FNPRM to retroactively apply proposed 931 MHz application processing procedures not only to applications currently pending before the Commission, but also to applications, such as the Tri-State Application, that were granted by the Commission many years ago but that are subject to petitions for reconsideration.[28] By these Comments, Tri-State firmly opposes the Commission's proposal to reclassify as pending 931 MHz PLMS

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[25]E.g., Teleprompter Cable Communications Corp. v. FCC, 565 F.2d 736, 741 (D.C.Cir. 1977) (hereinafter "Teleprompter"); National Beeper, Inc., 7 FCC Rcd 3202 (Com.Car.Bur. 1992); Sunde Cellular Communications, Inc., 8 FCC Rcd 502, 504 (Mob.Ser.Div. 1993) (hereinafter "Sunde").

[26]Id.

[27]See PLMS Stations KNKL 830, KNKG 822, KNKO 976, KNKP 205 and KNKS 214.

[28]FNPRM at ¶15. See footnote 24, supra.

applications "that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review."[29]

III. The Commission Lacks Legal Authority To Retroactively Apply Its Proposed 931 MHz Processing Rules Without Addressing Pending Reconsideration Requests

8. Section 405(a) of the Act allows interested parties to challenge Commission actions by filing of a petition for reconsideration or an application for review within thirty (30) days of that action.[30] Section 405(a) goes on to require, in relevant part, that:

> The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate....
>
> 47 U.S.C. §405(a).

In acting on petitions for reconsideration and applications for review, the Commission is obligated to: (1) review the petition; (2) either deny the petition, grant the petition and make a ruling on its merits in the same order or grant the petition but defer its ruling on the merits until after further proceedings; and (3) in

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[29] FNPRM at ¶15.

[30] 47 U.S.C. §405(a). Petitions for reconsideration may be filed pursuant to 47 C.F.R. §1.106 (and pursuant to 47 C.F.R. §1.429 in notice and comment rulemaking proceedings) seeking reconsideration of an action taken by the Commission or its delegated authority. Applications for review by the Commission of action taken pursuant to delegated authority may be filed pursuant to 47 C.F.R. §1.115. Both petitions for reconsideration and applications for review must be filed within thirty (30) days of public notice of the challenged action. 47 C.F.R. §§1.106(f), 1.115(d).

the case of petitions for reconsideration, issue a "concise statement of the reasons" for whatever action the Commission decides to take.[31] The Commission must base its decision on the facts surrounding the Commission action in question and apply the Commission Rules and requirements in effect at that time.[32]

9. If the Commission attempts to reclassify authorizations subject to reconsideration or review as pending applications as proposed in the FNPRM, the Commission will be directly violating Section 405(a) of the Act by acting on the underlying appeals by arbitrary rulemaking fiat, rather than by an examination of the facts surrounding each petition for reconsideration and application for review and application of Commission's Rules and requirements then in effect. A return to pending status of applications already granted by the Commission (or reinstatement of applications that have been dismissed or denied by the Commission) without review and decision based on the underlying relevant appeals is directly contrary to Section 405(a) of the Act. Accordingly, the Commission must reject its proposal in the FNPRM to return to pending status or reinstate 931 MHz PLMS applications that have already been acted upon.

10. Tri-State must also emphasize that the Commission's

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[31]47 U.S.C. §405(a); 47 C.F.R. §§1.106(j), 1.106(k), 1.115(g), 1.115(h); Home Box Office, Inc. v. FCC, 567 F.2d 9, n.27 (D.C.Cir. 1977), cert. denied, 434 U.S. 829 (1977); Horace Rowley, III, 48 FCC2d 835 (1974).

[32]Teleprompter, 565 F.2d at 742; National Cable Television Association, Inc. v. FCC, 747 F.2d 1503 (D.C.Cir. 1984); Great Lakes of Iowa, Inc., 8 FCC Rcd 5572 (Com.Car.Bur. 1993).

citation[33] to Storer Broadcasting v. FCC[34] and Hispanic Information and Telecommunications Network, Inc. v. FCC[35] does not confer on the Commission the authority to act on pending petitions for reconsideration or applications for review by post hoc rule modifications. As indicted by the Commission, Storer and Hispanic stand for the proposition that, "filing of an application does not protect the applicant from subsequent rule changes being applied to the processing of that application."[36] These cases might support the Commission's attempt to impose new processing rules on 931 MHz PLMS applications that have not yet been acted upon by the Commission. These cases do not, however, allow the Commission to reconsider and modify prior Commission actions without the deliberation and justification required by Section 405(a) of the Act and based solely on a prospective determination that proposed processing rules are superior to processing rules that resulted in the underlying Commission action. Accordingly, the Commission cannot rely on Storer or Hispanic to support its arbitrary decision to treat applications that have already been acted upon by the Commission as pending and therefore subject to new 931 MHz PLMS application processing requirements.

11. Tri-State must also point out that the Commission's proposed action in the FNPRM is not supported by the fact that

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[33]FNPRM at n.34.

[34]351 U.S. 192 (1956) (hereinafter "Storer").

[35]865 F.2d 1289 (D.C.Cir. 1989) (hereinafter "Hispanic").

[36]FNPRM at n.34.

grant of an application can be overturned by the Commission pursuant to a timely filed petition for reconsideration or application for review (or pursuant to a decision by the Court of Appeals or the Supreme Court upon judicial review of a Commission decision). It is well-established that license grants which are challenged by timely-filed appeals are subject to the outcome of those appeals and may be undone if the basis of the grant is reversed as a result of the appeal.[37] In the case of the Tri-State 931.4875 MHz System, if Paging Partners' petition for reconsideration is held to apply to the Tri-State 931.4875 MHz System Authorization, and if that petition is granted, the Tri-State 931.4875 MHz System Authorization could be undone. As demonstrated above, however, any Commission action pursuant to the Paging Partners petition for reconsideration must be: (1) justified by the Commission based on the facts surrounding the 900 MHz Settlement and grant of the Tri-State Application; and (2) based on Commission Rules and requirements in effect at that time. The Commission's decision on Paging Partners' petition for reconsideration cannot be based on a post hoc finding in the above-captioned rulemaking proceeding that proposed 931 MHz PLMS processing rules are more efficient than the rules that were applicable to the Tri-State Application and other 931 MHz applications involved in Lottery No. PMS-31 and the 900 MHz Settlement.

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[37] See, e.g., Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 (D.C.Cir. 1976); Sunde, 8 FCC Rcd at 504.

12. Tri-State must also emphasize that the Commission's attempt to retroactively apply the new processing procedures proposed in the FNPRM to cases already decided by the Commission must be rejected pursuant to the decisions in SEC v. Chenery Corp., 332 U.S.194 (1947) (hereinafter "Chenery") and Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380 (D.C.Cir. 1972) (hereinafter "Retail").[38] Specifically, in Retail, the Court enumerated the following factors to be considered in balancing the hardship from retroactive application of a new agency rule against any public interest considerations supporting such retroactive application: (1) whether the issue presented is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of the burden which a retroactive rule imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[39] An analysis of each of these factors demonstrates that the Commission's proposal in the FNPRM to apply new 931 MHz PLMS application processing standards to authorizations that have already been acted upon by the Commission is not justified.

13. First, the issue of processing of 931 MHz PLMS applications is not a matter of first impression. As demonstrated

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[38]See also Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-1556 (D.C.Cir. 1987) (hereinafter "Maxcell").

[39]Retail, 466 F.2d at 390; Maxcell, 815 F.2d at 1555.

in the FNPRM, the Commission has been processing 931 MHz PLMS applications under one set of rules since allocation of these paging channels in 1983.[40] To date, all 931 MHz PLMS applications have been processed based on these existing rules, including the Tri-State Application that resulted in grant of the Tri-State 931.4875 MHz System Authorization. The new 931 MHz PLMS application processing rules proposed in the FNPRM are not, therefore, a case of first impression, and as such, retroactive effect is not warranted.

14. Second, the processing procedures proposed in the FNPRM represent a dramatic departure from existing procedures. Under the Commission's proposal, the Commission would no longer assign 931 MHz PLMS frequencies;[41] new cut-off procedures would apply, particularly with respect to currently pending applications which are subject to a one-time 60-day cut-off period for amended and newly-filed applications;[42] and applications that have already been acted upon by the Commission would be returned to pending status and once again subject to a protest period, a cut-off period and additional MX applications.[43] The Commission's proposed 931 MHz PLMS processing procedures could not be more dramatically different than the procedures currently in place.

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[40]FNPRM at ¶¶12-15; see also First R&O, 89 FCC2d at 1356-1357; Public Notice, Mimeo No. 4395 (May 24, 1984); O.R. Estman, 5 FCC Rcd 7423, 7424 (Com.Car.Bur. 1990).

[41]FNPRM at ¶16.

[42]Id. at ¶¶16-18.

[43]Id. at ¶15, 17.

15. Third, as demonstrated by the Tri-State 931.4875 MHz System example, many 931 MHz PLMS licensees have relied extensively on the license grants that were made pursuant to existing application processing procedures. As in Tri-State's case, many such licensees have forcefully opposed requests for reconsideration of their license grants and demonstrated that such appeals must be rejected. As required by applicable precedent,[44] and based on their determination that any appeals are without merit and will be rejected, many of these licensees built their authorized systems, expanded those systems and now operate those systems for service to the public.

16. Fourth, there would be a substantial burden imposed on applicants whose 931 MHz PLMS applications have already been acted upon by the Commission if the proposal specified in the FNPRM is adopted. In the Tri-State example, rescinding grant of the Tri-State 931.4875 MHz System Authorization without required justification and returning the Tri-State Application to pending status would immediately deprive Tri-State of authorization to operate the Tri-State 931.4875 MHz System. Moreover, application of these proposed rules would subject the Tri-State Application to a new cut-off period during which other existing applicants, and even completely new applicants, could submit MX applications for 931.4875 MHz throughout Tri-State's service area.[45] As a result, unless Tri-State is able to outbid all other MX applicants

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[44] See footnote 25, supra.

[45] FNPRM at 17.

throughout the service area of the Tri-State 931.4875 MHz System in the competitive bidding that the Commission proposes to utilize to resolve MX conflicts between 931 MHz PLMS applicants, Tri-State would be unable to reacquire authorization for the Tri-State 931.4875 MHz System.

17. Finally, there simply is no statutory interest in applying the new rules proposed by the Commission in the FNPRM, at least with respect to 931 PLMS applicants whose applications have already been acted upon by the Commission. In the FNPRM, the Commission claimed that its public interest goals in proposing the new 931 MHz PLMS application processing rules were to "eliminate the backlog in pending 931 MHz applications and ensure that future channel assignments will be made in a fair and consistent manner" and that "the public interest in expeditious licensing and provision of service far outweighs any potential unfairness to pending 931 MHz applicants that our proposed rule might cause."[46] Although these goals may be laudatory, they are actually goals of administrative convenience adopted as part of an attempt to lessen the Commission's admittedly heavy burden of processing 931 MHz PLMS applications. These goals may support application of new processing procedures to those 931 MHz PLMS applications that are currently pending before the Commission, but these administrative goals in no way outweigh the extensive burdens set forth herein that will be imposed on applicants, like Tri-State, whose underlying 931 MHz PLMS applications have already been granted by

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[46] FNPRM at ¶17, n.34.

the Commission.

18. For all of these reasons, Tri-State respectfully submits that the Commission's attempt to retroactively apply the new 931 MHz PLMS application processing procedures proposed in the FNPRM to cases already decided by the Commission must be rejected pursuant to the judicial precedent established in Chenery and Retail and confirmed in Maxcell.

19. In light of these facts, Tri-State respectfully submits that the Commission lacks legal authority to reconsider prior actions and return to pending status previously-granted applications (or reinstate dismissed or denied applications) without consideration and decision based on the facts presented in any reconsideration request and analysis of Commission Rules and requirements then in effect. Moreover, retroactive application of proposed 931 MHz PLMS application processing rules at least with respect to applicants whose 931 MHz PLMS applications have already been acted upon, is in violation of relevant judicial precedent and must be rejected.

IV. The Commission's Proposal Will Result In Greater Application Processing Delays And More Litigation

20. The Commission's proposal to reclassify as pending 931 MHz PLMS applications that have already been acted upon by the Commission is not only in conflict with established precedent, but the proposal will also fail to achieve the Commission's stated goals of "eliminating the backlog of 931 MHz applications" and

"expeditious licensing and provision of service."[47] In point of fact, if this proposal is adopted, it will result in confusion, a substantial increase in the Commission's application processing burden and a corresponding further delay in licensing of 931 MHz PLMS systems and service to the public. Moreover, the proposal will inundate the Commission with extensive litigation in the form of additional petitions to deny, petitions for reconsideration, applications for review and judicial appeals, far greater than the litigation currently facing the Commission with respect to petitions for reconsideration and applications for review regarding applications that have already been acted by the Commission.

21. Tri-State must initially observe that the Commission's proposal to reclassify as pending, "applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review"[48] is confusing and difficult to interpret. For example, as discussed at footnote 24, supra, in the case of the Tri-State Application, it is not clear whether grant of the Tri-State Application as part of the 900 MHz Settlement is subject to the petition for reconsideration filed by Paging Partners. Accordingly, it is uncertain whether revised 931 MHz PLMS application processing procedures specified in the FNPRM would apply to the Tri-State Application.

22. Similarly, it is possible that a petition for reconsideration has, or will be, filed against grant of a 931 MHz

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[47] FNPRM at ¶17, n.34.

[48] FNPRM at ¶15.

PLMS application even though the petition is clearly defective (e.g., the petition is filed well beyond the thirty (30) day statutory and regulatory period for filing of petitions for reconsideration).[49] Under the Commission's proposal, the 931 MHz PLMS application that is subject to the defective petition for reconsideration would still be returned to pending status and subjected to the extremely onerous second protest period, additional cut-off period and possible loss of authorization without any Commission consideration of the defective petition for reconsideration.[50]

23. Even if the standard specified in the Commission's proposal is clarified, Tri-State respectfully submits that the Commission has failed to evaluate the extensive additional application processing burdens, licensing delays and further litigation that will result from the Commission's proposal to reclassify as pending applications that have already been acted upon by the Commission. The following highlights the most egregious difficulties that will result:

- The Commission will be inundated by a wave of amendments

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[49]47 U.S.C. §405(a); 47 C.F.R. §§1.106(f), 1.115(d).

[50]The Commission's proposal would even allow entities to submit a defective petition for reconsideration against grant of a particular 931 MHz PLMS application many years after the applicable deadline solely in the hopes of harming the licensee whose 931 MHz PLMS application is being attacked. Before the Commission could address the defective petition, the licensee's authorization would automatically be rescinded by operation of new rules adopted pursuant to the FNPRM. The licensee's application would be subject to petitions to deny and a new cut-off period and the licensee could very well fail to reobtain authorization for his frequency -- all without the Commission ever reviewing the defective petition.

to applications that the Commission has already acted upon. These amendments will have to be reviewed, placed on Public Notice and analyzed for MX conflict not only with other amended 931 MHz PLMS applications, but also with any new applications that are filed within the new 60-day one-time cut-off period specified in the Commission's proposal.[51]

- Under the Commission's proposal, each of these amendments will be subject to a new 30-day protest period,[52] even though the underlying applications were already subject to a 30-day protest period when they were originally filed.

- Because the underlying applications are already the subject of petitions for reconsideration or applications for review, it is likely that the appealing parties will feel obligated to protest the newly-amended applications. The Commission will therefore be faced with an avalanche of petitions to deny against applications that the Commission has already processed.[53]

- Even if petitions to deny these amendments are resolved, given the extraordinary nature of the Commission's proposal, it is almost certain that petitions for reconsideration and\or applications for review will be filed of whatever action the Commission may take with respect to the amended applications and any petitions to deny filed with respect thereto. In point of fact, because many licensees may have already expended substantial resources in developing their systems based on their determination that any outstanding appeals are without merit, it is almost certain that if these licensees are deprived of their authorizations as a result of the Commission's proposal, the licensees will pursue all available appeals through the Commission, the Court of Appeals and the Supreme Court, if necessary.

24. All of these points make one conclusion unmistakably

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[51] FNPRM at ¶17.

[52] Id. at ¶17.

[53] In many cases, like the example of the Tri-State Application, the Commission has already expended substantial resources in reviewing and acting upon litigation surrounding the original application. Accordingly, the Commission would be faced with having to review and write opinions on a new round of petitions to deny against applications that were already subject to extensive litigation.